



EMPLOYMENT TRIBUNALS

Claimant

Mr S Berns

-v-

Respondent

Department for Work and Pensions

FINAL MERITS HEARING (CONDUCTED IN PUBLIC IN PERSON)

Heard at: **Centre City Tower, Birmingham**

On: **21 to 25 October 2024**

Before: **Employment Judge Perry, Mrs J Whitehill & Mr JP Kelly**

Appearances

For the Claimant: **Mrs S Berns (wife)**

For the Respondent: **Mr A Vines (counsel)**

REASONS

The reasons below, are provided in accordance with Rule 62 and in particular Rule 62(5) which provides: In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues.

References below in circular brackets are to the first paragraph (if more than one) of these reasons to which the cross reference refers. Those cross references are provided for the assistance of the reader. The reader is asked to note that sometimes the transposition software used by HMCTS may mean that the cross references are not properly transposed and/or an error generated.

References in square brackets are to the page of the bundle in the form [hard copy/e-bundle], or where preceded by a document reference or the initials of a witness, that document or witness statement.

INTRODUCTION

1. There are some cases that tribunals have to hear where no one departs in a better position than they entered, for whatever reason that may be. Whether that is because of the effect that the claim or circumstances leading up to it has had on them or because of what that individual has or has not done. This is one of those cases. In Mr Berns' case he has been and remains very clearly affected by the events we will relay. As a panel we wish him and the other individuals involved well.
2. For the reasons we give below the time estimate on this case was too short. For reasons that will become apparent the Tribunal came to the view that it was inappropriate for Mr Berns' welfare for him to have to wait for a decision at its conclusion. So, with the parties' consent we gave a brief oral judgment which

can be found under the section headed “Our findings & conclusions”. We also understood that for the same reasons Mr Berns did not want reasons to be posted publicly on the web.

3. The judgment can be found using this link
[https://assets.publishing.service.gov.uk/media/67335c61bfc4a11a0612205c/Mr S Berns v Department for Work and Pensions 1304626.2023 Judgment No - Sig .pdf](https://assets.publishing.service.gov.uk/media/67335c61bfc4a11a0612205c/Mr_S_Berns_v_Department_for_Work_and_Pensions_1304626.2023_Judgment_N_o_-_Sig_.pdf)
4. Following the judgment, written reasons were requested by Wright Hassall LLP, a firm who had been instructed by Mr Berns. They did not attend the tribunal hearing or, in the traditional way, seek their attendance be excused. Given that was so, and based on what we refer to above, the judge sought they confirm that Mr Berns was seeking written reasons. They did so, as did Mr Berns who also wrote to the tribunal personally.

BACKGROUND

5. Mr Berns was employed by the DWP in various roles from 26 September 1988 until 21 February 2023 (nearly 35 years). Latterly his role was that of an Employment Adviser.
6. The claim is about constructive unfair and wrongful dismissal. Early conciliation started on 1 March and ended on 12 April 2023 (42 days). The claim form was presented on 19 June 2023. Any complaints that occurred before 9 February 2023 (42 days prior to 20 March 2023) are potentially out of time.
7. The issues have been clarified at case management hearings on 6 December 2023 and 1 July 2024. The claim was originally listed at the December 2023 case management hearing for a 12-day trial. When the claimant withdrew his various discrimination complaints at the July 2024 case management hearing the trial was reduced to 5 days.
8. Mr Berns resigned on the 21/2/23, with immediate effect, after receiving a letter on the 18/2/23 from the respondent. He describes receiving that letter as both a fundamental breach and the last straw in relation to the complaint for constructive unfair dismissal. He details bullying, harassing and victimising behaviour, failure to address properly his grievance and appeal against the grievance outcome as part of the course of conduct culminating in that. Some 26 further matters were raised in addition to the final straw as matters supporting that claim.

THE EVIDENCE

9. At the start of the hearing the panel had before us a bundle of 1152 pages, a chronology, cast list and reading list, together with witness statements from
 - 9.1. The claimant, Mr Steven Berns,
 - 9.2. Mr Sean Harris, a former colleague of Mr Berns who gave an account as part of Mr Berns’ grievance process,
 - 9.3. Ms Tracy Richardson, who was also a former colleague of Mr Berns who gave an account as part of Mr Berns’ grievance process,

- 9.4. Mrs Jacqueline (Jakl) Chambers who was Mr Berns' line manager during his absence immediately prior to his dismissal,
 - 9.5. Miss Cheryl Button was appointed as an investigator/decision maker in relation to a disciplinary matter concerning Mr Berns and Mrs Chambers,
 - 9.6. Mr Martin Swann, DWP's North & East Group Senior Universal Credit Operations Manager and the decision maker on Mr Berns' grievance,
 - 9.7. Mr Harry Bell, Mr Berns' line manager at the time of the majority of the events complained of and one of the subjects of Mr Berns' grievance and
 - 9.8. Ms Tina Evans, Mr Bell's line manager at the time of the majority of the events complained of and who was another subject of Mr Berns' grievance.
10. We did not have a witness statement for Mr Paul Gisbey who heard Mr Berns' grievance appeal, because we were told he has left the DWP's employ.
 11. The panel expressed our concern that given the number of issues and amount of evidence it was highly unlikely we would be able to conclude the claim in the time permitted. We set out the specific acts relied upon as forming the course of conduct in the Appendix (see page 39). Given the papers highlighted the effects events had had on Mr Berns we identified the imperative to have the case concluded in the time and to be able to give oral judgment so the parties did not have to wait for a written decision. Later events reinforced the correctness of that decision.
 12. The judge then referred the parties to Kaur v Leeds¹ with which Mrs Berns appeared not only aware of, but conversant. Whilst not a lawyer it transpired, she was a senior HR Director.
 13. The judge canvassed if any prejudice would be caused if the Tribunal limited its enquiries to the final straw (the decision to commence a disciplinary investigation), the grievance outcome and the grievance appeal outcome on the basis that, if they triggered the Malik threshold or were more than innocuous given earlier events, the constructive unfair dismissal threshold would be met. That was agreed and the need to call Mr Harris, Ms Richardson, Mr Bell and Ms Evans was thus dispensed with.
 14. We heard from Mr Berns, Miss Chambers, Mr Swann and Miss Button.
 15. Paragraph 13 of Miss Button's witness statement was amended from:-
"The DWP Disciplinary Procedure (Page 304 – 333) has a "fast track" process in cases of serious misconduct that are considered "straight forward" and may not require a great deal of investigation (Page 313). The fast-track process is not used when the allegations are of gross misconduct and could result in dismissal, or where the allegations would require extensive investigation. This case was considered under the fast-track process because I was of the view this was not an allegation of

¹ [Kaur v Leeds Teaching Hospitals NHS Trust](#) [2019] ICR 1, [2018] EWCA Civ 978 per Underhill LJ

gross misconduct and would require minimal investigation, given the employee had already admitted breaking confidentiality in writing (as discussed above). My role was to investigate the allegations and make a decision on whether or not they should be upheld, on the balance of probabilities, and to determine, if necessary, what sanction to issue.”

to

“The DWP Disciplinary Procedure (Page 304 – 333) has a formal investigation process for cases that need formal investigation rather than simple fact-gathering. I chose this process as although it was clear, from Steve’s admission, there had been a breach of confidentiality, the context of how this had come about needed to be established. I was of the view that all parties involved in the disclosure needed to be interviewed to establish how the breaking of confidentiality occurred and in which context as this had the potential to be materially impact the disciplinary penalty applied (if any). My role was to investigate the allegations, make a decision on whether or not, on the balance of probability there was a case to answer, and then determine, if necessary what disciplinary penalty to issue.”

16. We were informed **[redacted]** was **[redacted]** and so adjustments might need to be put in place for **[redacted]**. We conducted a mini ground rules hearing and ensured the adjustments sought were undertaken. During the hearing an incident occurred. To place this into context we first need to identify two points:-
 - 16.1. **[redacted]** had been assigned to line manage Mr Berns during a period when he was absent while a grievance was being investigated from Mr Berns about a number of others including his usual line manager
 - 16.2. **[redacted]** was later tasked with investigating if Mr Berns and **[redacted]** (who was also a witness in the grievance process) had discussed her evidence in the grievance process in breach of DWP’s rules
17. Whilst **[redacted]** was giving evidence the panel asked **[redacted]** about who Mr Berns could speak to if not **[redacted]**. **[redacted]** indicated he could have perhaps contacted DWP’s whistleblowing support line. Mr Berns laughed aloud. Whilst the Judge immediately asked him to leave and reflect on that, **[redacted]** became upset. The Judge arranged for **[redacted]** to have some time to reflect in a separate room on **[redacted]** own. When both had left the Judge discussed how the hearing would be conducted going forward with Mrs Berns and Mr Vines.
18. Suffice to say it was later reported to us that when Mrs Berns found Mr Berns he was upset. Given her concerns for his welfare she arranged for his sister to attend to be with him so she could continue to represent him. The tribunal indicated it would amend its sittings to facilitate this if it helped. Mr Berns passed on his apologies to **[redacted]** and the Tribunal and the Tribunal accepted them. Mr Berns then chose not to attend until judgment was delivered (although the Tribunal offered that he could attend remotely should he wish).
19. A number of key documents were redacted. It was difficult to thus understand them properly or the individuals involved. We ordered they be provided in an

unredacted form. The same is true for documents sent to Mr Berns during the process. Whilst we understand the need to maintain confidentiality if a party is unable to properly understand, engage with or respond to matters it is easy to see how their rights might be affected.

Chronology

20. Mr Berns started his employment with DWP on 26 July 1987. He was a few months short of his 17th birthday at the time.
21. In 2009 he reduced his hours to 30 hours per week spread over 4 days and in 2015 became an Employer Advisor, an Executive Officer role.
22. In November 2020 he moved from Cannock to be based at the DWP's Greengate Street, Stafford office (although post COVID he did not return to working onsite until 17 January 2022).
23. In October 2021 Mr Harry Bell was appointed manager of the DWP's South Staffordshire Employer Adviser team and in turn became Mr Berns' line manager. We were told he was based at Cannock, a different office to Mr Berns. His direct reports worked at a number of different sites, including Stafford, Cannock and Lichfield.
24. Mr Berns complains [SB/9 & 21] that Mr Bell had only 6 months experience at the Executive Officer (EO) level and no experience at the Higher Executive Officer (HEO) level at the time of his appointment and that he was *"hand-selected for this role over individuals with more experience who were not given the opportunity to apply via the usual application/promotion process in the civil service, which was not followed at all."*
25. In February/March 2022, Ms Tina Evans joined the Employer Adviser team as Senior Employer & Partnership Leader for Staffordshire. Like Mr Bell she was based at a different office to Mr Berns
26. The respondent's case is that following the ending of the Kickstart programme ² in March 2022, there was increased ministerial focus on the number of employers attending the Jobcentre, with a request for each site to submit numbers each week that ultimately were submitted to the Secretary of State, who had made the level of employer activity in the Jobcentre a ministerial priority. We were told that the number of employers present in Jobcentres and the number of events hosted to connect employers with DWP's customers fell within the remit of Mr Berns' role as an Employer Advisor.
27. How Mr Berns and his colleagues were encouraged to calculate and report those numbers (Mr Berns told us that Employer Advisers were encouraged by Ms Evans and Mr Bell to exaggerate and manipulate employer numbers which he considered to be falsifying data [SB/13]) and how the ministerial objective to get employers into Jobcentres was reported and recorded (Mr Berns told us [SB/34] that it was suggested to him by Mr Bell that he stop working with employers who did not wish to attend the jobcentre) formed part of Mr Berns' subsequent grievance.

² a government programme the aim of which was to reduce youth unemployment

28. Mr Berns told us [SB/15] that following his refusal to “*falsify the records for the Stafford Jobcentre’s performance*” he started to notice that Ms Evans acted in an unfair and bullying manner towards him and he believed that stemmed from his refusal to amend the recorded figures and her eagerness to please senior managers by reporting good performance statistics. Mr Berns also told us [SB/27] that soon after Ms Evans’ arrival he noticed Mr Bell’s attitude towards him also changed. He alleged Mr Bell became more aggressive and imposed unachievable performance targets on him. He stated that this matched Ms Evans’ conduct towards him and was for the same reason i.e. his refusal to amend the data.
29. Again, there appeared little dispute that there was an issue, at least in one respect. Ms Evans in her witness statement told us that between February and May 2022, she did not believe Mr Berns was delivering or helping with the delivery of those targets. She accepted conversations were had about that but disputed they were bullying, belittling or harassing. She asserted each of the conversations were polite and professional, as they were with everyone else in the team [TE/4]. Similarly, Mr Bell in his witness statement [HB/7-9] was of the view that Mr Berns’ attitude to bringing in new employers and meeting the targets set by the Secretary of State was negative and that employers were recruiting differently after Covid-19. Mr Bell’s view was that Stafford was failing to meet its targets whereas the other sites he was responsible for in Cannock and Lichfield were performing well and meeting their targets.
30. Mr Bell acknowledged [HB/8] that after Mr Berns had moved to Stafford it was agreed that he had been the sole Employer Advisor there. In April 2022 Mr Bell recruited an additional advisor, Ellen Evans (we will refer to her in this way to distinguish her from Ms Evans although Mr Bell referred to her as Ellie). Mr Bell suggests that was because Stafford was underperforming, and he wished to address that. Mr Bell also suggested in his witness statement that Mr Berns felt that it was an attempt to replace him. Mr Berns said as much to Mr Swann [754]. It should be noted that even if Stafford was underperforming, any assessment of Mr Berns’ performance should have been judged against Mr Berns being a fractional employee and his targets and performance reflect this. We return to this at (120).
31. Mr Bell stated in his witness statement that the impression he had was that Ellen Evans took to the role quickly and was responsible for bringing in more employers to the site than Mr Berns which he stated was evidenced by the level of activity after Mr Berns had moved roles [820]. Further, that in meetings to discuss the level of activity at the Jobcentre, Ellen Evans seemed more engaged and proactive. He contrasted that to Mr Berns’ attitude.
32. On 21 March 2022, Mr Berns applied for but was not offered an interview for a temporary Employer Services Leader role. This role was that of a Higher Executive Officer i.e. a promotion by one grade. The process was via an expression of interest exercise.
33. Mr Berns subsequently complained about the decision and process adopted. Mr Swann [MS/27.2] said that having investigated he concluded that the application forms were anonymised before they were sifted (the sift having been carried out by Mr Tony Cardell, Customer Service Leader for Stafford, Lichfield and

Cannock and Ms Evans. Those who were successful at sift were interviewed by Mr Bell and Ms Evans). Mr Swann told us he concluded that it was a fair recruitment process and that Mr Berns' experience did not entitle him to automatically be put forward for interview.

34. Mr Berns was then absent from work on leave/non-working days/bank holidays from 11 April 2022 – 19 April 2022. He returned to work on Wednesday 20 April 2022. As a result he suggests the weekly record of employers on site supplied [820 also at 851] was thus an unfair measure when he was not present and, whilst they showed a spike for one month after he was replaced by a full-time member of staff, the numbers quickly returned to what they had been [SB/68].
35. At 10:16 on 21 April 2022 Mr Berns emailed Mr Bell [418-421] to address two issues:-
 - 35.1. To make a change of working pattern request. Mr Berns complained that Mr Bell failed to acknowledge or discuss this with him in any way, let alone in accordance with the DWP's procedures.
 - 35.2. To confirm that he had rearranged his non-working day on Tuesday 26 April 2022 to Friday 29 April 2022, as requested by Mr Bell in order to attend an away day.
36. Also, on 21 April 2022 there was a visit to the Stafford jobcentre by Ms Debbie Woodcock, Group Director, of which Mr Berns had no prior knowledge. He told us Ms Woodcock spoke to a number of individuals that day during her visit to understand more about planned employer activity. Mr Berns told us [SB/25], given he had been away from the office prior to her visit, he did not have a lot of information he could provide at this time, but he listened to Ms Woodcock's instructions and suggestions before feeding this information back to Mr Bell via an email of 11:28 that day [430].
37. Despite Ms Evans and Mr Bell not being present, Mr Berns complains [SB/26] that there followed a chain of emails from them where they informed him of Ms Woodcock's instructions [422-430]. He asserts much of the information contained was incorrect despite him trying to clarify what had been discussed *"they continued to place responsibility for everything Debbie had talked about on my shoulders ... without them seeking to understand from me what I was specifically asked to action, or how they could support this"*.
38. Again, at least in one respect, there is little difference between the parties' positions as to what occurred. Whilst he was not present, Mr Bell [HB/22] told us that in line with the ministerial objective, Ms Woodcock's visit focused on employer activity at Stafford as she was unhappy with the level of employer activity there and she told Mr Berns that improvements were needed imminently, that she wanted an update on employer activity and what had been done at Stafford in order to improve that activity within the next week.
39. Mr Berns told us [SB/29] that on 22 April 2022, Mr Bell held a Microsoft Teams call with him that lasted for over an hour and during the call Mr Bell informed him that he had cancelled Mr Berns' attendance at the team away day on Tuesday 26 April and had informed the team. Mr Berns accepted that Mr Bell stated this was to allow him time to work on the actions requested by Ms

Woodcock, but Mr Berns also stated, *“The cancellation was perceived by me, but also by colleagues who questioned why I was not at the event, as a punishment.”* This later formed one of his grievances [532].

40. Mr Berns told us [SB/28], although he did not date this, other than to say it was after Ms Evans’ arrival:-

“... that I was informed by my colleague, Sean Harris, Stafford Jobcentre Manager ..., that he had been present at a number of meetings, where Harry and Tina had stated that I was not performing in a disrespectful manner. I consider this to have been unfairly bad-mouthing me and tarnishing my reputation, in front of a group of other managers. I felt incredibly self-conscious after hearing this and started becoming anxious about undertaking any piece of work or engaging with Harry and Tina. I was also embarrassed by how I had been negatively and unfairly portrayed to a number of my colleagues. As a result, I became quieter and withdrawn when in their presence at work.”

41. Mr Harris in his witness statement said this, dating it to March or April 2022:-

“19. It was raised by Tina that Steve had not been recording as many employers. It was hard to get other employers in. In the aftermath of COVID, with the lockdowns ending and restrictions slowly being lifted, it was difficult to get employers to want to come into the office.

20. The gist of the conversation was, if Steve’s not getting employees in, we’ll have to get someone that can get employers in instead. ... I recall one of the criticisms was that Steve wasn’t recording these virtual employers in the office. However, the discussions had always centred around the fact that EA’s should be getting ‘employers in the office’.

21. The conversation moved fairly suddenly, and this change in discussion came from Tina. She said, “Well OK then, he’s not gonna be an EA much longer then. It’ll be back to work coaching.” She was fairly blunt about it and that made me uneasy because I thought no one’s actually spoken to Steve here to ask why there are not many employers being recorded and this did not sound like Steve – especially when he used to smash his performance in a particularly challenging work coach role, so it seemed disrespectful for Tina to be speaking about Steve like this in front of other colleagues. Again, the more I thought about it, if there is an issue with someone’s performance, there is a process for dealing with performance and this would definitely involve at least discussing this with Steve. It did not seem, based on the discussion at this meeting, that Steve had been spoken to at all about this.

22. To be clear, I am not saying Steve did have poor performance, only that if Tina did perceive that there were concerns and he was being slapdash with his record keeping, then they should have spoken to him about this.”

42. Mr Bell’s account in his witness statement was that he suggested to Mr Berns that he should not attend the away day, rather than mandating that so he could focus on getting the work done. He continued *“This was not seen as anything*

punitive. The away day was not compulsory, and attendance very much depended on people's availability and work demands. Ellie, the other Employer Advisor at Stafford, also missed the away day due to not being in the office, if she was, she would have also missed the away day to support Steve."

43. In his subsequent grievance and witness statement Mr Berns references a jobs fair he was organising on 31 May 2022. He complained that despite having checked the designs with Jared Healey, DWP's local Communications Manager, having sent the designs to Ms Evans she

"... responded, copying large numbers of staff and managers into her email reply, where she made clear that she was unhappy with my approach and pointed out numerous issues with the design [413]. If Tina had wanted to provide her opinions, she could have done this in a positive manner, but I felt that her intention was instead to berate and humiliate me in front of my colleagues. When I arrived at work the following morning, two managers were talking in a corridor but stopped to laugh at me and stated, "I see you're in trouble again". This severely knocked my confidence and left me feeling incredibly undermined, embarrassed and quite foolish at work."

44. The two managers referenced were stated in Mr Berns' grievance as Jackie Chambers and Tony Cardall [531]

45. Ms Evans' response was dated 7 April [413] and the "to" and "cc" lists were exactly the same as that to whom Mr Berns had sent the email, indicating she had pressed "reply all".

"Hi Steve / Ellie

Thank you for pulling this together and sharing with us.

I have to make several comments to make though please:

1. I thought it was our jobs fair and that we were using NSCG premises; are NSCG bringing employers to the event? This indicates to me that this is an NSCG event.

2. Jobsfair needs to be 2 words please.

3. Would you centralise the 'Jobs Fair' please as the text is not central? Is the central panel intended to run into the orange section?

4. There is nothing which relates to the job centre signage – would you include the JCP logo please as our customers can relate to that?

5. Way to Work – needs to be more prominent and not on the bottom of the right hand side.

6. The colours also need to be Way to Work colours as it is a JC event. This colour scheme seems to favour the NSCG, again not something our customers can relate to.

Thank you again for doing this but the above amendments are needed please.

Tina"

46. On Friday 25 April 2022 Mr Bell and Ms Evans arrived at Stafford Jobcentre for an unplanned meeting [434 to 459]. They asked Ellen Evans, the Jobcentre Manager, Mr Tim Mansell and Mr Berns to remain after others left. Mr Berns' recounts [SB/31] how the meeting lasted for over an hour with very little being said by anyone other than Ms Evans and whilst Ellen Evans did try to input to explain why employers were no longer keen to work with the Jobcentre after the financial incentives of the kickstart scheme had been withdrawn, she was quickly closed down by Ms Evans. Mr Berns stated that he was very guarded about speaking to either Mr Bell or Ms Evans given what Mr Harris had said their prior conduct towards him and so he did not add anything further to what Ellen Evans said.
47. Mr Berns told us that at the end of the meeting Ms Evans asked him to remain with her and Mr Bell and they spent a further 10 minutes discussing how to encourage employers to come into the Jobcentre. He questioned before us why he was singled out for this when Ellen Evans was also at the meeting and was also responsible for getting employers in the office. He stated that this felt, to him, that Mr Bell and Ms Evans were trying to place all responsibility and blame disproportionately on him. He stated that again he was put under pressure to falsely record information to give better statistics for both Stafford sites and to meet Ellen Evan's portion of numbers of employers in the office as well. [SB/33]. Mr Berns also alleged [SB/34] that Mr Bell suggested during the meeting (he did not say which one) that Mr Berns stop working with employers who were offering Jobcentre claimants opportunities because this did not suit the way Mr Bell wanted to record performance, and that Mr Berns cut off support to those employers. He added that Ms Evans backed that up stating they could access DWP's services in other ways [454]. Mr Berns portrayed that as him being set up to fail, as that would have only reduced numbers and cut off relationships that he had spent considerable time trying to build.

The start of Mr Berns' sickness absence

48. It was common ground that on Friday 6 May 2022 [705-707] Mr Berns alleged that Ms Evans called him, explained that she was making changes within the team, and that he would be moving into a work coach role from 16 May 2022. That role was within the same grade (i.e. still Executive Officer). He told us there was no consultation about this and no discussion about performance. Whilst we did not hear from Ms Evans, for the reasons we give above she did not dispute that in her witness statement [TE/26] she made it clear that was her decision.
49. Her rationale, as relayed in her witness statement [TE/25-26], is that following the visit from Ms Woodcock on 21 April 2022 the message conveyed was "*if you can't meet targets/aspirations, come talk to me*" (i.e. the district directors and Mr Berns' line managers) and that Mr Berns' name and Stafford were mentioned. She alleged that Mr Berns reputation of doing enough to get by but that he never went above and beyond or exceeded expectations, had preceded him. She stated the performance of Employer Advisors in Stafford had long been a concern and Ms Woodcock's visit had highlighted to her issues that she did not believe Mr Berns could resolve, despite the initial success of him arranging the employer area, and helping pick up the pace with employer activity in response

to Ms Woodcock's visit. The increased scrutiny on employer activity meant that Mr Berns' and Stafford's performance would be more closely monitored.

50. Mr Berns told us [SB/45-47] he felt Ms Evans' timing of the discussion (he told us this was around 15:45 late on a Friday afternoon) was intended to ruin his weekend as he would be unable to follow up the discussion (he was not due to return to work until Wednesday 11 May 2022) and when he did so he would be in an unfamiliar role and within a new team. As a result, he felt incredibly stressed. Accordingly, on 11 May he felt unable to attend work and called in sick, stating that his absence was due to stress.
51. He did not return to work prior to his subsequent resignation.
52. At 09:04 on 13 May 2022 Ms Evans emailed Ms Woodcock cc'g Mr Higginson and Mr Taundry both of the DWP district office (ie all managers senior to herself) and and Mr Bell:-

"Hi Debbie

I thought you might like an update following your recent visit to Stafford Green Gate.

Following your visit, the position with employers in office improved week commencing 2/5/22; I understand that Steve Berns, the EA you spoke with when you visited, has sent an update to you, albeit later than you requested. There were some great outcomes for our customers and great feedback from the employers who were on site that week; that is what we aspire to see each and every week.

I think you were aware that I was in the process of addressing the performance relating to employers in offices / performance with the EAs in Stafford Green Gate. I am disappointed though, that despite conversations with Steve, it took your visit to initiate the change in energy and pace that was needed.

Part of the action I was taking, involved changes to the EA team in Green Gate.

On 6/5/22 I had a conversation with Steve to inform him that despite his efforts week commencing 2/5/22, he did not have the enthusiasm, drive and passion to deliver in the EA role and that he would be moving to the work coach role. I also reiterated my disappointment that it had taken your visit to prompt that 'pace'.

Steve was on leave / NWD on 9 and 10 May. On 11 May he contacted his line manager to say he was sick and unable to attend work; his incapacity, work related stress.

Please be assured that the attendance management process will be robustly followed and that appropriate action will be taken.

When you visit Green Gate again, you will see a very different, motivated and passionate EA team."

53. Whether that was warranted or not in terms of laying blame at Mr Berns' door it indicates where she and possibly also Ms Woodcock felt it lay for the poor performance against the Secretary of State's expectations.
54. During that absence Mr Berns complains about the number of emails he received from Mr Bell including what he perceived as pressure for a day one occupational health referral and details about loss of pay which he perceived as overly aggressive and harassing. In addition, Mr Berns references Ms Evans' comment that his absence would be managed robustly as an indication that was predetermined. That formed head 7 of Mr Berns' grievance. Mr Swann's findings in relation to that can be found at (92).

Mr Berns' Grievance

55. Mr Berns lodged a formal grievance on 13 June 2022 [524 to 539]. There were 8 parts to the grievance:-
 - 55.1. Ms Evans moving Mr Berns from his role as a work coach role from 16 May 2022 "without notice or justifiable reason" [525]
 - 55.2. The failure to appoint Mr Berns in March 2022, to the role of a Temporary Employer Services Leader (or even offering him an interview). He describes that as unfavourable treatment compared to others [528]
 - 55.3. A decision to require Kickstart Employers to attend the jobcentre and an instruction to Mr Berns to stop working with employers who did not wish to attend the jobcentre [529]
 - 55.4. Ms Evans sending an email, the wording of which and choice of recipients was intended to humiliate and embarrass Mr Berns in front of colleagues and make him feel his performance was substandard [530]
 - 55.5. Mr Bell's failure to acknowledge or respond to request to Mr Berns' change of working pattern request in accordance with the policy [531]
 - 55.6. Following feedback given at an in person visit by Ms Woodcock, this was portrayed as resulting from poor performance on Mr Berns' part and he was told he would not be permitted to attend a Team away day. Mr Berns viewed that as a punishment [532].
 - 55.7. The aggressive and heavy-handed management of Mr Berns' sickness absence.
 - 55.8. Mr Bell and Ms Evans encouraging staff to exaggerate and manipulate employer numbers within the office, which is effectively a request to falsify data.
56. Part of Mr Berns' complaint before us was that his allegations against Mr Bell and Ms Evans were not investigated thoroughly or at all.
57. Mr Berns told us as he had named his manager, Mr Bell, within his grievance that he did not feel comfortable liaising with him anymore concerning his sickness absence.
58. On 22 June 2022, Mr Berns forwarded his grievance to James Taundry, District Operations Lead asking him to acknowledge receipt [580]. The

contemporaneous documents we were taken to do not suggest Mr Berns raised that concern directly with Mr Taundry. That aside, Ms Chambers, the Manager of Stafford Jobcentre (where Mr Berns worked) told us [JC/4] that around 22 June 2022 she was contacted by Mr Bell and Ms Evans and asked to take over Mr Berns' absence management because he had raised a grievance regarding Mr Bell's handling of Mr Bern's absence (amongst other matters). She told us Mr Bell felt it would be inappropriate for him to continue managing Mr Berns' absence and he felt an impartial person should do so whilst the grievance was outstanding.

59. On 23 June 2022 Mr Bell emailed Mrs Chambers with documents relating to Mr Berns' absence [589]. Mr Berns and Mrs Chambers met on 24 June 2022 [600] and continued to do so on a more or less monthly basis (those meetings didn't always take place as scheduled). She told us during those meetings it was clear that Mr Berns' view was that he would return to work when there was certainty regarding his job and when his grievance had been dealt with.
60. Initially Elaine Dudley, a Work Coach Team leader was appointed by Mr Taundry as the Investigation Manager [579]. Mr Berns objected to her appointment on the basis amongst other matters that she was investigating managers at a higher grade than she was, and she was Facebook friends with Ms Evans. Mr Taundry emailed on 11 July 2022 to apologise to Mr Berns and stated he was appointing Corrine Dexter, NEM Leader - Labour Market Decision Makers to undertake the investigation [577].
61. On 12 July 2022, Ms Dexter wrote to Mr Berns inviting him to a meeting to discuss his complaint [616-617]. The meeting took place via Microsoft Teams on 19 July 2022. Mr Berns' union representative Rachel Sabin and a notetaker, Nicola Robinson, were also present. The minute is at [638–645].
62. Whilst it is undated, it appears from its contents that after the meeting Mr Berns emailed to her some further comments [635-636].
63. Ms Dexter also met with Ms Evans on 27 July 2022 [652 – 667], Mr Bell on 28 July 2022 [672 – 679], Keith Darby (a Partnership Manager, who worked in the same room as Mr Bell on 1 August 2022 [681], Mr Cardell (see (33 and 68) on 1 August 2022 [682-683] and Mandy Harrison (Ms Evans' personal assistant) on 2 August 2022 [684). It is common ground it was suggested they all be interviewed by Ms Evans.
64. Mr Darby was asked if he had overheard a conversation on 22 April between Mr Bell and Mr Berns. He indicated he could not remember any detail of the call other than Mr Bell had some concerns about Mr Berns' work and what he should be doing, that it was a difficult conversation and quite challenging but Mr Bell seemed to handle it really well ("he was so calm and really nice towards Steve in his responses trying to explain stuff to him").
65. Mr Cardell was asked about a number of incidents. He refuted Mr Berns' interpretation of events/account in relation to each, save with regards to Ms Woodcock's visit where he stated *"Everything she said was directed at Steve. She was blunt and directive."* He concluded the interview stating *"... there were none to very little employers in the office and to be honest Ellie taking over was*

the best thing that could of happened to Stafford, Steve never seemed to put any effort in.”

Ms Dexter’s grievance investigation outcome

66. On 8 August 2022, Ms Dexter produced two investigation reports concerning the parts of the grievance relating to Mr Bell [710 – 715] and Ms Evans [716 – 720].
67. She concluded that the evidence did not support the allegations made by Mr Berns regarding all the incidents save for item 5, which Mr Bell accepted was overlooked in error.
68. The grievance was ultimately referred to Mr Martin Swann, a Senior Business Manager for a Group Director as decision maker. Initially however Louisa Dawson, a Customer Service Leader was appointed. Mr Berns objected on the basis she was a Senior Executive Officer, the same grade as Ms Dexter. Mr Berns’ objection was acknowledged and accepted and Jasmine Trigg, District Operational Lead was then appointed as decision maker. Mr Berns having been informed of her appointment, wrote to Mr Taundry to again object on the basis Ms Trigg’s partner, Mr Cardell, was named in the grievance (see 63)) and that Ms Trigg and Ms Evans have worked together and appear to be Facebook friends. In doing so Mr Berns expressed concerns about confidentiality due to the number of individuals who were being passed details of his grievance. Again, Mr Berns’ objection was acknowledged and accepted.

Mr Swann’s actions and his decision

69. On 15 September 2022 Mr Taundry emailed Mr Berns [743] to say Mr Swann would be dealing with Mr Berns’ grievance. Mr Berns told us [SB/63] he responded on 16 September 2022 agreeing to meet . He also asserted Ms Dexter’s grievance meeting notes did not accurately reflect their meeting on 19 July 2022.
70. Mr Swann wrote to Mr Berns on 20 September 2022 to acknowledge his grievance [748]. He subsequently forwarded to him the evidence Ms Dexter had gathered. As part of a series of emails between them Mr Berns provided Mr Swann with a statement from Tracy Richardson, another Employer Advisor, whose role had been changed to work coach [749 – 751] and made it clear he was unhappy with the way in which the investigation was being undertaken [1107-1109]. Mr Berns stated [SB/64] he found the witness statements upsetting to read, giving the example of Mr Darby’s statement [804]. Mr Darby had been his line manager and close colleague for many years and Mr Berns felt his statement was in total contradiction to a 30 years of service letter he had written previously, praising my dedication and professionalism.
71. Having considered Ms Dexter’s reports, and following the submissions from Mr Berns, Mr Swann’s view [MS/9] was that further witness interviews were required before making his decision. As a result, he invited Mr Berns to a grievance meeting on 23 September 2022 [748]. They met for approximately 2 hours via Microsoft Teams [752-757]. Also present were Ms Sabin and a notetaker Jane Key.

72. As we say below, one of the issues we encountered was that when Mr Berns was asked to reference support for some of his assertions, he was unable to do so. In addition, some of the complaints included either no dates or errors as to the dates. Others referenced incidents at one point as support for one allegation and then later these were not referenced in relation to the first but were referenced in relation to another or not at all. As we say below, conflating the supporting evidence across complaints combined with the breadth of those complaints meant that Mr Swann had an almost impossible task to have been expected to link some of the evidence or assertions across what was being alleged.
73. An example is in relation to “Incident 6” from Mr Berns’ grievance [532-533]. The headline in bold atop the two pages of narrative in the grievance is **“Visit from senior manager [Ms Woodcock on 21 April]. Actions were requested from me and others in relation to the Job Centre Layout. This was misinterpreted, and as a direct result there is perceived poor performance. Also taken off a Team away day as punishment - perceived victimisation by me.”**
74. Mr Berns, on the next page of the grievance text, referenced an email from Ms Evans that he stated was timed at 15:47 on 22 April 2022 [425-426] . The email of 15:47 was not from Ms Evans but a reply from Mr Berns to an email Ms Evans had sent at 11:20 earlier that day [426-427] following the visit the day before from Ms Woodcock the day before.
75. Two of the issues raised in the grievance were that Ms Evans copied other senior colleagues in, which Mr Berns alleges was with the intention to embarrass him given the negative feedback it contained. Another was her raising an issue with his email signature being wrong, an error made by other advisors, leaving him to feel singled out.
76. Yet by the time of the meeting with Mr Swann, the copying in of the email to other managers with the intention to humiliate was referenced in the context of *“Incident 1 - Loss of role without notice or justifiable reason”* (see [754] although the date of the email is not referenced in that meeting). Further, the reference to Ms Woodcock’s meeting with Mr Swann was that following it “things ramped up” [753]
77. Ms Evans’ email of 11:20 in turn was a reply to an email the day before that Mr Berns had sent to Mr Bell “ccg” Ms Evans, Mr Cardall and Mr Mansell setting out his understanding of the instructions from Ms Woodcock. The “recipient” list from Ms Evans was the same as that to which Mr Berns email was sent.
78. We read her email of 11:20 as Ms Evans clarifying to Mr Berns how he had misunderstood the instructions from Ms Woodcock. Had she not done so it may have been grounds from which we could conclude she was setting up Mr Berns to fail. However, having realised he had misunderstood what he was being asked to do, we read her email as her trying to clarify Mr Berns’ misunderstanding. We find, that being so, that it was incumbent on her to do just that. Whilst it was to the point, we consider it explained what was required. We do not read it as trying to embarrass.

79. Following the meeting on 26 September 2022, Mr Berns emailed Mr Swann to say that Sean Harris, formerly a Work Coach Team Leader, was willing to meet with him.
80. On 6 October 2022, Mr Swann emailed Mr Berns to say that following HR advice, he had decided to gather additional information [791]. On 10 October 2022 Mr Swann emailed Mr Berns [776] to advise that he planned to hold a number of additional meetings including with Mr Harris to look into Mr Berns's submissions.
81. On 11 October 2022 Mr Swann met Mr Harris [813-814] and they discussed Mr Berns' allegation that Mr Harris had warned Mr Berns to "*watch his back*". Mr Swann told us [MS/25.1] that Mr Harris explained that during cluster meetings of management at the Jobcentre he got the impression Mr Berns' job was under threat because of the underperformance of the Jobcentre, and it had been implied Mr Berns would be moved to a Work Coach role.
82. On 14 October 2022 Mr Swann met Ms Harris to discuss what she had heard on 6 May 2022 when Mr Berns was informed of his move to the role of Work Coach [765- 766]. Ms Harrison confirmed she took a note of the conversation between Ms Evans and Mr Berns.
83. On 17 October 2022 Mr Swann interviewed Mrs Chambers [768-770 also at 815-817]. At the start of the meeting she asked if Mr Swann was aware that she had line manager responsibility for Mr Berns' attendance/absence and that he was fully aware that the attendance management action and her witness statement were two separate entities. Mr Swann told us [MS/25.3] they discussed Stafford Jobcentre's performance during cluster calls. Mrs Chambers said she could not recall Mr Berns' name being specifically mentioned but there was a discussion whether he would have the requisite knowledge for work on universal credit, that performance in the Jobcentre had improved since Mr Berns' job role had changed, and that the Stafford Jobcentre was now meeting its targets.
84. Towards the end of the minute she is recorded as having said that Mr Berns "... *was emotional on Friday 6th May when he was shouting when talking to Tim and herself and removed the situation from the 'shop floor', he was emotional as he could not see the value of the ask and getting employers in. Jaki also advised that she was unaware of Steve's sickness absence until she was asked to 'pick up' the 28-day review.*" [769]
85. On 19 October Mr Berns responded [776] to Mr Swann's email of 10 October saying, "*I think I may have a meeting with Jaki Chambers from Stafford JCP this afternoon, so will explain the current situation if she asks.*" Mr Swann responded [775], "*I think you are fine to give Jaki a general sense of the current status of your grievance, in terms of where I am at, with proceedings.*" Mr Swann went on to give an update on the progress of the interviews.
86. On 28 October 2022 Mr Swann separately met both Mr Bell [784–786] and Mr Mansell [782 – 783].
87. Mr Swann told us [MS/25.4] the meeting with Mr Bell focused on Mr Berns' performance and events leading up to his grievance. Mr Bell's view was that Mr

Berns' performance up to March 2022 was good, although it could have been better. Mr Bell attributed that to the Kickstart programme which was helping bring in employers and when that ended Mr Berns' performance declined. Mr Bell explained how Ellen Evans was brought into the team in April 2022 to help performance and that he felt that Mr Berns had a lack of respect for him. Mr Bell continued by saying that Mr Berns had told him that if he didn't believe in something, in this case, the ministerial target of bringing in employers into the Jobcentre, then he struggled to deliver and how during a meeting prior to Mr Berns' move, to discuss employer activity at Stafford, Mr Berns had not contributed.

88. He told us [MS/25.5] that Mr Mansell confirmed performance at Stafford had been discussed in various meetings, including those involving Mr Harris and that due to the focus on employer activity in Stafford, Mr Berns' name would have naturally been brought up. When asked about Mr Harris' view that Mr Berns' position was at risk, he could not recall that being the case.
89. On 1 and 4 November 2022 [787-788 & 787] Mr Swann gave further progress updates to Mr Berns.

The events of 7 November & Mr Swann's grievance outcome. On 7 November 2022 Mr Berns went onto half pay as he had been on sickness absence for 6 months.

90. Also, that day an email was sent to the whole district from Ms Rachel Musson, District Operational Lead for Staffordshire and Derbyshire District [796] stating that Ms Evans had been successful with an expression of interest exercise and with effect from 25 November 2022 she would be taking up a post on detached duty in Mercia District for 6 months.
91. Finally, on 7 November 2022, Mr Berns, Ms Evans and Mr Bell were sent the outcomes of Mr Berns' grievance [798-802 and also at 846-850]. The covering email from Mr Swann to Mr Berns was sent at 18:48 [797]. Ms Evans and Mr Bell were sent the parts of the grievance outcome that related to them. Mr Bell's was sent at 18:50 and can be found at [803].
92. He concluded as follows:-

*"Incident 1 – ... in relation to the change in your job role. Tina Evans took this decision, independently of Harry, due to a lack of pace and rigour in your approach to supporting Stafford achieve the Secretary of States ambitions **However, the evidence does support the fact that Tina had not ensured the departments standards, around addressing dips in performance, had been correctly followed, before changing your job role. I therefore partially uphold your grievance on this point as this is a breach of standards by Tina Evans.***

Incident 2 – ... You had an opportunity to apply for a post that was being advertised the same as other colleagues. Being an experienced member of staff, is not an automatic right to progress through to interview Candidates still need to meet the criteria or standards Your application was assessed by a panel made up of Tina Evans and Tony Cardall. The evidence shows this sift was done without the panel

knowing names of candidates. Your application was found not to have been strong Tina gave you feedback, ... with pointers as to how you could have strengthened your application, I find there is no suggestion of any unfavourable or unfair treatment in this respect. I find no evidence to suggest you were treated unfairly in respect of the appointments made.

Incident 3 – ... During Kickstart...building excellent relations with employers to support more customers into work. ... was ... [w]hat Employer Advisers like you, were asked to concentrate on. The evidence shows that your performance was not as strong ... in building these relationships with employers. ... these relationships were needed to help Stafford ... achieve the Secretary of States weekly expectations for employers in offices. ... this did not necessitate you exclusively working with employers who were willing to come into the office, but to prioritise those in the first instance. You told Martin Swann that you did not speak at a meeting that Tina and Harry led out, where the performance of Stafford's employer offer was discussed. You told Martin Swann that it was not the sort of meeting where you could not speak, it was more around listening to what you were being told. However, you did say that your colleague Ellen did speak, You said you felt that being asked to stay after the meeting and talk to Tina, was an example of bullying. I find that you were aware of the need to improve the employer performance at Stafford and your role, as an Employer Adviser, was central to this agenda. Clearly there were opportunities for Employer Advisers to speak at the meeting, as evidenced by the fact you said Ellen had ... contributed I find the fact that Tina asked to you to stay after the meeting when you had contributed nothing, was not an example of bullying, but instead one of firm management.

Incident 4 – The evidence shows Tina had identified some changes that she wanted made to the external marketing material that you and Ellen were working on, for an upcoming Jobs Fair. You had sent this to Tina via an email and copied a number of other colleagues in as well. Tina responded to all, acknowledging the work that had been done and giving thanks for this, but nevertheless, pointed out some requests for changes to be made. You felt that this was humiliating. I find it is normal practice for leaders to quality assure work, and for changes to be requested. I also find that extra scrutiny is not unusual for anything that is being used externally. I find Tina's explanation for the way this was handled and the issue of the request for you to change your job title on your email signature, is in line with what I would consider to be firm management and not bullying.

Incident 5 – Harry Brook has said this was an honest mistake and something that he had simply missed, in relation to a request from you to change your working pattern. The evidence suggests this was an isolated incident and I therefore find this was a genuine oversight and not an example of bullying.

Incident 6 – In your meeting with Martin Swann you said that you recognised the sites performance was poor and not where it needed to be. You also said that you felt that 9 employers in the offices each week could be achieved, given time. ... at the time of the Director's visit to Stafford, the sites performance was not where it needed to be. In addition, the evidence also supports the fact that your performance was no longer satisfactory, with not only Harry Brook reporting this, but also a number of leaders and colleagues, who reflected this to Martin Swann, ... Instead of attending a District Employer & Partner event, you were asked to remain in the office to work on actions that had arisen from the Directors visit. These actions were intended to help the site improve its performance You felt the decision to ask you to remain in the office ... was a punishment. I find this to be an example of firm management. The alternative of you attending the event, would have reduced the time available to complete the actions set by the Director by a day, making it much harder for the office to succeed in meeting the Secretary of States' weekly priorities.

Incident 7 – ... Harry Brook followed the DWP standard procedure of Day 1 referral for an Occupational Health Assessment, in cases of absence relating to stress and anxiety. Your complaint was this referral was not explained to you very well and you felt you just needed to be left alone for a few days. Your view was this approach was heavy handed. I find that the process is covered in depth in guidance which is available for all staff to view. The referral is a supportive measure, as acknowledged by Rachel Sabin, your Trade Union representative, ... The evidence shows that you report that you had been suffering with stress and anxiety for around the last 8-12 weeks. This puts the onset of this, somewhere between the middle of February 22 to the middle of March 22. There is no evidence to say that you raised this with Harry or anyone else prior to May 22, after the decision was taken to change your job role. The evidence shows that Harry followed the policy throughout the period he managed your absence. I therefore do not find any evidence to suggest either Harry or Tina's approach to managing your absent, was heavy handed as this was done, in line with the Departments policy.

Incident 8 - ... The evidence shows that Harry and Tina were tasked, as leaders, to get a least 9 employers in the Stafford Job Centres each week, as had been set by the District and were pressing you and Ellen to achieve this. I find the expectations of Harry and Tina to achieve 9 employers across the Stafford offices each week, was not unreasonable and is an example of firm management on their part.

An additional issue arose from Corrine Dexter's investigation, where it was identified that Mandy Harrison had secretly taken notes of the conversation, Tina Evans had with you on 06.05.22, when you were informed of your change in job. I find that this amounts to a breach of standards."

93. It is to be noted Mr Swann incorrectly referred to Mr Bell as Mr Brook. That is careless and should not have happened.

94. As to the actions he directed be taken to address the concerns raised, these were as follows:

“• I have referred the case to Rachel Musson to consider the Discipline procedures to follow, where there has been a failure in standards.

• I have also referred that case to Rachel Musson to consider the outcome that you are seeking from the grievance, in terms of re-instatement of your job role.

• I have also fed to Rachel Musson the potential for some refresher training for colleagues around the departmental guidance covering management investigations, dips in performance and recording of conversations and meetings.”

95. Having set out Mr Berns' right to appeal Mr Swann's outcome concluded:-

“I would like to remind you that you are required to respect the confidentiality of the case and must not discuss it with anyone unless it is necessary to do so in connection with the investigation or with someone who is providing personal support such as the Employee Assistance Programme, a trade union representative or family member. All documents shared with you remain confidential too. Any breach of confidentiality could lead to disciplinary action.” [802]

96. Mr Berns complains about the grievance outcome, stating amongst other matters (and we do not intend to list them all) [SB/68-69] that *“His outcome letter completely missed the point of the investigation and focused on a performance and character assassination of me. ... Interviews with individuals were misrepresented in the outcome letter...”* and *“Despite providing evidence to support my concerns (a supporting statement from my colleague, Tracy Richardson ...), alongside evidence rebutting performance concerns, Martin opted to ignore this in favour of fully backing Tina and Harry ...”*.

97. That last comment is not entirely true. Mr Berns' grievance was partially upheld setting out failures on the part of Ms Evans, Mr Bell and Ms Harrison, that he be reinstated and recommended training and disciplinary processes be considered.

Mrs Chambers' meeting with Mr Berns on 11 November 2022

98. On 11 November 2022 a regular review meeting concerning Mr Bern's absence was held between Mrs Chambers and Mr Berns, at which Ms Sabin (Mr Berns' union representative) and Erkan Altunel, a notetaker were present. They were minuted [862-863 also at 1029-1030]. At the end of the meeting the minutes record

“JC- I think it's best to leave the meeting there for today Steve as I can see your upset.

Is there anything else you would like to speak about?

SB- There is please, I don't mind if its miniated [sic.] or not?

JC- It's up to you Steve, what would you prefer to do?

SB- In private.

JC- No problem. For the purpose of the minutes, thank you Erkan for attending today."

99. Mrs Chambers told us that Mr Berns proceeded to ask her about her statement to Mr Swann. She told us [JC/9] *"Mr Berns was very upset about what she had said and berated me about the statement I had given"*. She told us Mr Berns *"verbal attack left me upset, and I had to be comforted by his trade union representative Rachel Sabin"*.
100. Mr Berns' account can be found at [SB/77]:
"I also explained that Jaki, who was managing my sickness absence, had discussed the fact she had given a statement to Martin but had never seen a copy of this or agreed that its contents were correct. The statement Jaki gave was regarding a conversation she instigated in April 22, when I was visibly upset by Tina's bullying behaviour towards me. Jaki asked me to speak to her in a private room to enable me to vent safely and promised me this discussion would be held in confidence. I was very surprised and disappointed to see that Jaki had broken her promise and relayed the conversation to Martin, to use against me [768-769]"
101. We should also reference what he said in his resignation letter (see (129)), his statement at [SB/81] where he explained he was threatened with a disciplinary sanction *"as a result of having responded to Jaki's questions about the evidence she gave as part of my grievance. Jaki, despite being the one to start this conversation was not, to my knowledge, being treated in the same manner."* .
102. Following the meeting Mrs Chambers told us she requested a copy of the record of her investigation meeting notes, and having reviewed them felt they were an accurate reflection of what she had said.
103. A further attendance management meeting was held with Mr Berns' on 13 January 2023 (that was put back to that date because of Mr Berns' Trade Union representative's leave [890]. Mr Berns agreed to consent to an occupational health referral which the DWP say was hoped would assist with his return to work. He provided that consent on 19 January 2023 [929 & 931-932], the referral was made on 20 January 2023 [938] and an Occupational Health appointment was booked for 6 February 2023 [939],
104. A further attendance management meeting was scheduled for 17 February 2023.

Meeting with Ms Musson - Tuesday 15 November 2022

105. Mr Berns and his union representative Ms Sabin met with Rachel Musson, DWP's Service Leader for Staffordshire and Derbyshire. The meeting was recorded and subsequently transcribed [871-888]. It was common ground [882, SB/71 & JC/12] that Ms Musson offered to reinstate him in his role as an Employer Advisor. Mr Berns stated he couldn't fathom how he could be offered a role which he should never have been removed from in the first place and, as there was no consideration how this would work in reality given the concerns he

had raised about leaders within the team, he felt it was clear that this was a hollow offer and not a genuine attempt to assist him back to work.

106. Ms Musson followed that up with an email setting out the “headlines” of what had been discussed on 18 November [882]:-

“Following the decision made by Martin Swann I am taking forward Martin's recommendations, which include:

1) Advising you that following a return to work you would be reinstated you [sic.] as an Employer Adviser and I will notify Thea Fearn that your role is that of an Employment Adviser. We discussed what might be best in terms of location of your role, but at present you were unsure

2) Recommended actions and required learning as a result of the findings of Martin's decision

- I will ask a Grade 7 colleague to review the timeline you have shared with me*
- I will look at what learning could be put in place for notetakers*
- You advised me that you want to appeal the decision made by Martin and you are currently preparing to put your appeal through to the Appeal Manager*
- You are continuing to work with Jaki Chambers in relation to your absence from work”.*

107. The transcribed minutes also show that:-

107.1. The reference to the timeline was a request from Ms Musson in response to Ms Sabin raising that the delay in addressing the grievance had led to Mr Berns’ going on to half pay and they wanted to stop that happening to someone else because of the effects it had had on Mr Berns. Furthermore, Mr Berns felt that delaying the process had been part of a strategy on DWP’s part. Ms Musson indicated that in relation to any reduction in pay that would require Mr Berns to lodge a further grievance [873-876].

107.2. Ms Musson also told Mr Berns that she would be taking up with the individuals concerned the matters raised by Mr Swann, but they were confidential [876].

107.3. That in addition to giving Mr Berns an opportunity to discuss what location he would work from, that also extended to who would supervise him [877] and that Ms Musson had not wished to make any assumptions before then as to what he wished to do [878] and so she needed to know what Mr Berns wanted in terms of going back to Stafford or another office and what role that would be as, linking that to line managers and any training required [879]

107.4. Mr Berns stated he would need time to think about it [878]

107.5. Mr Berns stated he didn't feel the initial grievance had been investigated properly and would be appealing [877 & 879]

108. Mr Berns told us that despite what Mr Swann had recommended, he wanted to clear his name regarding the alleged performance issue and that he could not return until the grievance appeal had been concluded.

Mr Berns' appeal against the grievance outcome

109. On Monday 21 November 2022, Mr Berns appealed the grievance outcome to Brendon Downie [(covering email) 888-889 and (grounds of appeal) 883-886] as directed by Mr Swann [801]. On 22 November 2022, Mr Downie confirmed that he was the wrong person to hear the appeal. On 25 November 2022, Mr Gisbey emailed Mr Berns to explain he would now be dealing with the grievance appeal, had received the papers and sought to identify a time to meet [895].
110. Later that day Mr Gisbey emailed Mr Berns again to say that having read through the papers he saw that Mr Berns wished to have the Appeal dealt with through correspondence and had also indicated he had additional evidence, so Mr Gisbey apologised for his earlier email. He went on to ask Mr Berns to indicate when it was likely he would supply the detail to him [894]. Mr Berns responded to say he was awaiting the outcome of a Subject Access Request and would supply the detail as soon as possible [893]. There followed an exchange where Mr Berns chased that up and also updated Mr Gisbey.
111. A series of emails ensued in which Mr Berns provided supporting evidence and highlighted elements of witness statements that were incorrect [923-927], that the meeting notes from Ms Evans' interview with Ms Dexter were a cut and paste but did not truly reflect the meeting that occurred. It appeared to him that Ms Evans had not been formally interviewed by Ms Dexter and that Mr Swann had misinterpreted Mr Harris's statement and used this against him. We return to the latter at (116).
112. The extent of the documents supplied by Mr Berns were enormous. We return to this below at (160).
113. Mrs Chambers told us [JC/13-16] that following her meeting with Mr Berns on 11 November 2022, and the offer of re-engagement from Ms Musson on 15 November 2022, a further attendance management meeting was held on 13 January 2023 (apparently that was delayed as a result of Mr Berns' Trade Union representative's leave (see [890])).
114. Mrs Chambers wrote an outcome of the 13 January meeting to Mr Berns on 30 January 2023 [945], confirming that Mr Berns was unable to plan for a return to work until the internal appeal process had been completed and that Mr Berns had agreed to provided his consent for a referral to Occupational Health. She also made clear that given the appeal was still ongoing she would support his sickness absence and not consider dismissal or demotion at that point. A further attendance management meeting was scheduled for 17 February 2023.
115. Following the meeting on the 13 January 2023, Mr Berns provided his consent via email on 19 January 2023 [929] for a referral to Occupational Health. Mrs Chambers made the OH referral on 20 January 2023. The Occupational Health appointment was booked for 6 February 2023. Mr Berns did not attend [971].
116. On 19 January 2023 Mr Berns e-mailed Mr Gisbey [933 – 935] amongst other matters saying this:-

“... I have spoken to Sean Harris and Jaki Chambers. Both are unhappy with the statements taken by Martin and how they have been interpreted. Jaki Chambers, who is handling my sickness absence, became upset and distressed when I asked to discuss what she had said to Martin in her statement. She stated that her conversation had been misinterpreted and also told me that she had asked to make another statement. The correct revised statement was ignored by Martin when making his decision. Jaki also stated that she felt I had been and was continuing to be treated very badly. This conversation was witnessed by my union rep who asked why Jaki did not speak up at the time?”

.... Whoever wrote the outcome letter completely misinterpreted what had been said by Sean Harris. This may have been an honest mistake but it was also signed and sent, unchecked, by Martin Swann.” [934]

117. The reference to how Mr Harris had been misinterpreted centred on the following extract from Mr Swann’s outcome letter:-

“Sean [Mr Harris] said that Steve [Mr Berns] was not good at reporting employer activity and didn’t feel he was out of the office engaging with employers sufficiently.” [836]

and the following paragraph from Mr Harris’ interview with Mr Swann

“Martin ... asked Sean why he felt it was personal to Steve. Sean stated that he couldn’t recall who the second employment adviser was, so it was likely they were new to the role, Sean advised that Steve was named in person and that he was not good at recording employer activity and did not always evidence activities, he confirmed other employment advisers were not mentioned in these meetings and felt the newly posted adviser was intended to replace Steve.” [763 and also at 813]

118. Mr Berns asserts that Mr Swann misinterpreted this as being Mr Harris’ view of Mr Berns whereas in the context of the question, Mr Harris was portraying that as what he had heard. Mr Berns points to the preceding paragraph of the minute of the discussion which emphasises that *“Martin asked Sean what he had heard in terms on conversations and dialogue”*. That Mr Berns is correct is emphasised not only by Mr Harris’ witness statement but further that it also has to be viewed against Mr Harris’ comments that immediately preceded the question being posed:-

“... From the conversations he had heard he felt it was obvious Steve’s position was under threat, not so much from Harry, more from Tina and it was implied that he was going to be moved into a work coach role, Sean explained that he would have expected a performance plan to be put in place, and that he knew a few before leaving that Steve’s day were numbered. He explained that Steve had been working hard to get employers into the office and that it was only care companies willing to come in and that was not what the business needed, he felt Steve was between a rock and a hard place.”

119. What Mr Harris meant on reading the minute of the meeting alone was that he was reporting what he heard in the paragraph we quote at (117) above and his own view was very different. Mr Harris' witness statement merely reinforces that interpretation.
120. When Mr Swann was asked about that he told us that whether that was Mr Harris' view or not, there was *"already established a prima facie evidence of a dip in performance"* and when it was put that Mr Berns had run 2 sites for 2 years as an 80% employee (i.e. 4 days a week) he indicated that he knew that and *"judged it in the round based on my assessment. Mr Berns didn't contribute at the meeting and described [when he was asked to remain after the meeting with Ms Evans and Mr Bell (see (47))] as pointless [see [552]]"*.
121. Whilst Mr Berns did not agree, the perception of Mr Berns' view of the Secretary of State's ambitions was seen as negative and in conflict with achieving those directed objectives. That is clear from the numerous findings Mr Swann made in relation to incidents 1, 3 & 6 of his outcome (see (92)) and the conclusions in his management investigation [1120].

Paul Gisbey's appeal outcome of Thursday 2 February 2023 [957 to 968].

122. Mr Gisbey upheld the original decision made by Mr Swann. Mr Gisbey however noted:-

"I was very concerned to hear that you have spoken to key witnesses in this case and discussed confidential matters related to it. It is my understanding that this should not happen, and I do not intend to make speculative contact with any witnesses. No one has contacted Martin Swann or me about any such matters. I will raise this with Rachel Musson in my note to her.

I have taken specialist HR advice on all aspects of your case in as outlined in the preceding paragraphs and in reaching my own conclusions here. It is clear to me that the actions taken during that period in which you were moved fell short of the standards that we expect when managing performance issues. Again, I will be making that point to Rachel Musson." [967]

123. Miss Button was appointed to conduct the investigation sometime around 8 February [972]. As part of that she sought advice from HR on 14 February 2023 [980]. She told us she was also tasked with investigating the conduct of Mrs Chambers in relation to the same incident. Whilst Miss Button found the allegation that Mrs Chambers had breached procedure to be unsubstantiated, the critical issue from our perspective is that whilst Mrs Chambers was also extremely upset that she was subjected to a disciplinary investigation, she like Mr Berns was investigated.

17 February 2023 meeting with Mrs Chambers

124. In addition to not attending the Occupational Health appointment booked for 6 February 2023 (see (115)) Mrs Chambers told us that Mr Berns did not attend *"... the scheduled meeting with me on 17 February 2023, I could not get hold of*

Steve. He did not return my calls or emails. I was unaware he had resigned until a few weeks after his resignation.” [JC/15]

125. Mr Berns on the other hand told us in his witness statement [SB/80] that the meeting went ahead and that a return to work was raised. His witness statement added “... *but also asked if I’d thought about leaving the department. She could not explain where I would potentially be working or what role I would be given. She agreed to try and obtain this information and come back to me the following week.*”
126. Mr Berns accepted in cross examination that whilst “*she couldn’t give me any details*” of where he would be working, what his job would be and who he would report to he accepted *that he was not ruling out going back to work at that point. He confirmed that was correct.* We find that as at the 17 February he had not ruled out going back to work and any return was subject to the details being mutually agreed.
127. When Mrs Chambers was asked about this and the absence of any notes from that meeting she told us she had no specific recollection of the meeting but that her husband had had major surgery around that time.
128. The evidence we heard and the absence of a note lead us to conclude that whilst a formal attendance management meeting did not take place a keeping in touch meeting was held and that was what Mr Berns referenced. Given Mrs Chambers did not dispute Mr Berns’ account we accept his account that they met.

The notice of disciplinary investigation

129. On Saturday 18 February 2023, Mr Berns received a letter by post from Miss Button [(redacted) 1013-1014 unredacted 982-983] dated Friday 17 February 2023. In his witness statement [SB/81] Mr Berns said it stated:-

“... I would be investigated for speaking to my witnesses and face potential dismissal from the Respondent, regardless of my participation in the process It was quite clear by this point that the Respondent wanted to make an example of me for raising my grievance against those in senior management. I could not believe that I was being threatened with a disciplinary sanction and potential dismissal as a result of having responded to Jaki’s questions about the evidence she gave as part of my grievance. Jaki, despite being the one to start this conversation was not, to my knowledge, being treated in the same manner. It was clear that the Respondent was not going to stop their campaign of bullying and harassment until I left my role.”

[Our emphasis]

130. What Mr Berns was not aware of was that Mrs Chambers was also investigated by Miss Button for having spoken to Mr Berns [1123-1124].
131. Whilst Mr Berns stated in his witness statement that he faced potential dismissal he did not. Miss Button’s letter said this:-

“I am writing to advise you that I am investigating whether you breached the DWP Standards of Behaviour in not respecting the confidentiality of

your recent grievance case by speaking to two witnesses about their statements.”

[she then went on to relay the content of Mr Berns’ email of 19 January (see (116) above]

“These allegations are being investigated at serious misconduct level.

The purpose of the investigation is to gather and present evidence. The investigation report will show whether, on the balance of probability, there is a case to answer.

...

You should be aware that any information that emerges from this investigation might be used in any discipline proceedings against you. If it is decided to instigate discipline action, the procedures outlined in the Discipline procedure will be followed. The investigation report, and any other information used in determining whether to proceed with discipline action, will be made available to you.

...”

132. Mr Berns was a long-standing employee and union representative. He was or ought to have been aware had he reviewed DWP’s Disciplinary procedure [304-333] and its discipline guide for employees [204-210] that serious misconduct was defined as something for which dismissal was not an available sanction [319 paragraph 7.34]. He thus knew or ought to have known dismissal was not being considered.
133. Mr Berns resigned from his role on 21 February 2023 [986 to 991].

Disciplinary Investigation Outcome & Report

134. Whilst these events post date, and therefore have not impacted on Mr Berns’ decision to resign, we set them out, so the full story is relayed.
135. Miss Button subsequently wrote to Mr Berns on 15 March 2023 to inform him that despite his resignation the disciplinary investigation would continue, and she wanted to give him the opportunity to answer questions she had. Mr Berns felt unable to correspond with the DWP any longer and gave authority for his wife to act on his behalf, which she did.
136. On 20 April 2023 Ms Button met with Mrs Chambers [1021-1025] and on 3 May 2023 with Rachel Sabin, Mr Bern’s trade union representative [1026-1028] ³.
137. On 25 May 2023, Ms Button wrote to Mr Berns to relay the outcome of her misconduct investigation. She summarises the evidence she collated at [CB/17]. She concluded that he had breached DWP’s standards of behaviour and would be given a first written warning which would remain on his record for 12 months [996-997].

³ The panel raised the issue of the date given on the minutes of Ms Sabin’s meeting with Miss Button and it was agreed that was incorrect. The correct date was agreed as 3 May.

138. Mrs Berns appealed the decision and also complained to Ms Musson that Mr Berns continued to receive correspondence direct from Craig Wood, Miss Button and Ms Musson despite his request for correspondence to be sent directly to his wife and not him.
139. Sally Ann Hall was appointed the Appeal Manager and invited Mr Berns to an appeal meeting on 12 July 2023 [1052]. Mrs Berns responded confirming that Mr Berns was unable to attend but Ms Hall should have all the information that was required but if Ms Hall had any further questions, she could write to Mrs Berns who would be happy to provide any further documents, clarification or written submissions. Mrs Berns also highlighted that Ms Hall had failed to spell Mr Berns' name correctly.
140. On 28 July 2023 Ms Hall forwarded the appeal outcome to Mr Berns [1056-1061]. She concluded the written warning should be revoked and removed from his records. Whilst she rejected some of the grounds of appeal amongst other matters
- 140.1. she found that Mr Berns:-
- “... had admitted to approaching a witness after he had received it following his decision.*
- The business may have considered its decision in placing Steven under the direct line management of a witness whilst the case was ongoing and may provide some mitigation for actions demonstrated.” [1057]*
- 140.2. that with regards to the procedure adopted by Miss Button and Mr Berns' right to set out his case and answer any allegations that have been made that:-
- “It may have been reasonable to have allowed more time for a response prior to proceeding to a decision.” [1058 & 1059]*
- 140.3. and that:-
- “There is nothing noted to suggest Jaki knew the private conversation was going to be about the statement. It is clear from records that Steven was suffering with his mental health which would offer some mitigation in his decision to discuss the witness statement when it was clear in the Discipline Guide for Employees that this would be a breach of confidentiality.*
- The business had offered support with regular contact during the Attendance management process and offers of support through signposting to third parties. There is documentation of Jaki's concern for his wellbeing. [1060]*
- ...
- The mitigation now provided has enabled me to review the original decision and conclude that on the balance of probabilities given Steven's mental health and the fact there were regular meetings with a person who was involved in the original case may have*

compromised Steven's position and enabled a conversation that may not on the balance of probabilities otherwise taken place.

The First written warning is to be overturned and removed from the records [1061]"

141. Mr Berns also raised an issue regarding redaction which Ms Hall determined had been addressed in accordance with the DWP's rules. We address the redaction issue's impact on the tribunal claim at (1619) above.
142. The repeated appointment of officers as investigators decision makers and interim line managers led us to conclude that DWP's procedures were such that proper thought was not being given to their appointment. The appointment of Mrs Chambers was a case in point. Whilst both she and Mr Berns should have identified and pushed back to managers about that (as Mr Berns had repeatedly did about other appointments) that does not exonerate the DWP managers who appointed those individuals from that responsibility. Ms Musson made clear in her meeting that would need to be addressed by a more senior manager (a grade 7).
143. Whilst Ms Hall found DWP had offered support with regular contact during the attendance management process and offers of support through signposting to third parties, that frankly did not address the issue. Neither Mr Berns nor Mrs Chambers should have been put in the position they were. That they were is a sad reflection on the DWP. The DWP needs to reflect on these issues as Ms Musson promised and to learn from that.
144. Mr Berns complains [SB/90] that like *"...the grievance process, the disciplinary process took an unreasonable length of time, resulting in a significant impact not only on me and my health, but also on those around me. It was an extremely difficult time for me and my family, and made only worse by the Respondent's uncaring, aggressive and half-hearted approach to my genuine concerns."*
145. Whilst DWP's procedures provide for a Fast Track process [312-313], that is where the case is *"7.5 ... straightforward, where the evidence is readily available and the facts of the case are not likely to be in dispute."* The line manager/decision maker is required at the outset to decide whether or not using the fast-track process is appropriate (7.3).
146. That process required:-
 - "7.7. In fast track cases, a simple fact-gathering exercise should take place with only the following discipline procedure steps required:*
 - the allegations being put to the employee in writing, including a full explanation of the alleged misconduct together with a brief description of the evidence with the employee being allowed a reasonable amount of official time to prepare their case and get advice and support from a trade union representative or work colleague*
 - a meeting with the line manager who will take the role of Decision Maker, where evidence will be presented and the employee will have an opportunity to present their case together with any mitigation; at*

this meeting the employee has the right to be accompanied by a trade union representative or work colleague and 5 working days' notice will be given. Discipline Model letter 4 should be used to invite the employee to the meeting.

- *the line manager will decide whether or not there are reasonable grounds that the specific offence alleged against the employee in the discipline letter is proven. In all cases of serious misconduct the Decision Maker must consult CSHR Casework to discuss an appropriate penalty before informing the employee. ..."*

147. In addition to DWP's Disciplinary procedure [304-333] we had before us the DWP's discipline guide for employees [204-210]. Amongst the numerous other documents we had before us was DWP's "How to: Investigate discipline and grievance cases" [240-249].
148. As we say at (15) above, in her witness statement Miss Button fundamentally changed how she described the process she adopted in her investigation (from the fast track to the step 5(b) formal investigation).
149. In the context of the step 5(b) formal investigation route, once that was completed the DWP's procedure required:-

"7.20. ... the Decision Maker to decide, on the basis of all the evidence, whether or not there is a case to answer."

and if so:-

"7.22. ... the Decision Maker will need to take further formal action and should write to the employee who has been investigated as soon as possible and within 5 working days of receiving the report and invite them to a formal meeting to discuss the findings of the investigation. If they haven't already done so at Step one of the procedures (Deciding the level of misconduct), it is mandatory that the manager informs the employee of the level of alleged misconduct before the meeting using the Discipline Model letter 4 - Decision meeting invitation. ..."

7.23. The Decision Maker should:

- *give the employee at least 5 working days' notice of the meeting and allow the employee a reasonable amount of official time to prepare their case and get advice and support from a trade union representative or work colleague*
- *tell the employee they have the right to be accompanied by a trade union representative or work colleague. If the employee or their companion cannot reasonably attend the meeting, the employee should propose several new dates to the manager to allow the meeting to take place within 5 working days of the original meeting date. Managers can reasonably apply discretion to allow a short extension to this deadline to ensure employees can attend and are accompanied by someone of their choice. If the employee fails to engage or cooperate with meeting arrangements and/or fails to attend the scheduled or re-scheduled meeting, consideration of the*

discipline case will go ahead in their absence based on the available information

- *ask the employee if any specific requirements or adjustments need to be made to enable them to attend the meeting*
- *enclose the investigation report and witness statements/appendices. The manager must not release third party information contained in the reports, such as staff numbers and NI numbers. A redaction checklist will help managers decide what is relevant*
- *arrange for a note-taker to attend the meeting.”*

150. We can find no trace of that second stage, namely the decision on whether there was a case to answer followed if so by the invitation to a further meeting enclosing the investigation report, advising of the right to be accompanied and to seek adjustments etc.
151. We find that based on the advice she received from HR [980] and the complexity of the DWP's policy, Miss Button conflated the investigation and decision roles. The task of an investigator in such circumstances was to identify if there were prima facie grounds to indicate there was a disciplinary case to answer. If that threshold was reached the decision maker should have then embarked on the decision-making process. Whilst DWP rules suggest for matters of serious misconduct such as this, the investigator and decision maker could be the same person (see Ms Hall's decision [1058]) the DWP's procedure, natural justice and good practice all dictated there be a clear separation and notification to the employee between the two stages. That was not done and Miss Button and the DWP conflated the two.
152. DWP may as a result wish to reflect on the clarity of its procedures and the training and guidance issued.

THE LAW

153. The law relating to constructive unfair dismissal is set out in Kaur v Leeds¹ by Underhill LJ:-

"38. ... At para. 14 of his judgment [in Omilaju⁴] Dyson LJ summarised the general law of constructive dismissal as follows (p. 487 B-H):

"(1) The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: Western Excavating (ECC) Ltd v Sharp [1978] 1 QB 761.

(2) It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example, Malik v Bank of Credit and Commerce International SA [1998] AC 20, 34H-35D (Lord

⁴ London Borough of Waltham Forest v Omilaju [2004] EWCA Civ 1493, [2005] ICR 481

Nicholls) and 45C-46E (Lord Steyn). I shall refer to this as 'the implied term of trust and confidence'.

(3) Any breach of the implied term of trust and confidence will amount to a repudiation of the contract - see, for example, per Browne-Wilkinson J in Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666, 672A. The very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship (emphasis added).

(4) The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in Malik at page 35C, the conduct relied on as constituting the breach must 'impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer' (emphasis added).

(5) A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put at para [480] in Harvey on Industrial Relations and Employment Law:

'[480] Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the "last straw" which causes the employee to terminate a deteriorating relationship.'

I will as a shorthand refer to what Dyson LJ calls "the implied term of trust and confidence" – see his point (2) – as "the Malik term", and to conduct the components of which are not individually repudiatory but which cumulatively [3] constitutes a breach of that term as conduct which "crosses the Malik threshold".

[Note 3 - Of course not all breaches of the Malik term are of a cumulative character. A one-off act on the part of the employer may in itself be likely to damage or seriously destroy the relationship of trust and confidence between employer and employee.]

39. Against the background of that summary Dyson LJ addressed the last straw doctrine specifically in paras. 15-16 of his judgment (pp. 487-8), which read:

"15. The last straw principle has been explained in a number of cases, perhaps most clearly in Lewis v Motorworld Garages

Ltd [1986] ICR 157. Neill LJ said (p 167C) that the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence. Glidewell LJ said at p 169F:

'(3) The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term? (See Woods v W. M. Car Services (Peterborough) Ltd. [1981] ICR 666.) This is the "last straw" situation.'

16. Although the final straw may be relatively insignificant, it must not be utterly trivial: the principle that the law is not concerned with very small things (more elegantly expressed in the maxim 'de minimis non curat lex') is of general application."

40. The particular issue in Omilaju was, as Dyson LJ formulated it at para. 19 (p. 488 F-G), "what is the necessary quality of a final straw if it is to be successfully relied on by the employee as a repudiation of the contract?". He answered that question as follows (pp. 488-9):

"19. ... The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase 'an act in a series' in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.

20. I see no need to characterise the final straw as 'unreasonable' or 'blameworthy' conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.

21. *If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. **Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so.** If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle. **[Emphasis supplied]**"*

Although that passage is primarily concerned with an issue which does not arise in this case, I have set it out in full because the sentences which I have emphasised in the middle of para. 21 are important for the issues which do arise.

...

51. *... both Glidewell LJ in Lewis and Dyson LJ in Omilaju state explicitly that an employee who is the victim of a continuing cumulative breach is entitled to rely on the totality of the employer's acts notwithstanding a prior affirmation; provided the later act forms part of the series (as explained in Omilaju) it does not "land in an empty scale". ... the right to terminate depends on the employer's post-affirmation conduct. ... there is nothing wrong in speaking of the right to terminate being revived, by the further act, in the straightforward sense that the employee had the right, then lost it but now has it again.*

...

55. *I am concerned that the foregoing paragraphs may make the law in this area seem complicated and full of traps for the unwary. I do not believe that that is so. In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:*

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation ?

(2) Has he or she affirmed the contract since that act ?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract ?

(4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory)^[6] breach of the Malik term ? (If it was, there is no need for any separate consideration of

a possible previous affirmation, for the reason given at the end of para. 45 above.)

(5) Did the employee resign in response (or partly in response) to that breach ?”

OUR FINDINGS & CONCLUSIONS

154. This has been a difficult case for all concerned. There was an incident on Day 4 that we must briefly touch on at (17 & 18) for which Mr Berns rightly apologised. We are grateful for that apology. That incident caused some considerable upset for Miss Button. It is worth noting because it is indicative how this claim and the events leading to it have greatly affected Mr Berns as well.
155. Mr Berns' complaints before us centred on the failure to address his grievances adequately or at all by Ms Dexter, Mr Swann and Mr Gisbey and then the decision to investigate/discipline him by Miss Button.
156. We have considered the heads of grievance individually. Mr Swann, in particular, remedied any failings of Ms Dexter; he conducted his own additional investigation. Despite seeking to clarify the basis for the appeals and seeking further evidence, it was clear to us that Mr Berns was finding it difficult to pull everything together and link the evidence to his complaints by the time Mr Swann was appointed.
157. We find that Mr Swann weighed the evidence and its relevance and balanced the need to investigate a head (or sub-head) of complaint against the time that it would take to do that and what relevant evidence any investigation could potentially generate.
158. As Mrs Berns rightly identified in closing, there are substantial problems in a case such as this where delays arise. As some of the issues and evidence that were raised over the course of the week showed, some of the issues raised by Mr Berns were either raised obliquely or, where the focus of it, at least as so far as it was put at later points, changed. We give examples of this above.
159. The conflating of the supporting evidence across complaints combined with the initial breadth of the complaints meant that Mr Swann had an almost impossible task to have been expected to link some of the evidence or assertions across what was being alleged.
160. In Mr Berns' email of 19 January [921-926] he highlighted the difficulties he was having with the numbers of documents and for that matter the effects of the delay. *"I am willing to answer any specific questions you have and supply supporting evidence where possible but so simply ask me to provide everything you want me to consider is impossible, as I don't know what information you have seen. I have now been in this situation for 8 months."* [926]
161. In his evidence before us, when he raised a failing, we asked him to point us to where he had raised this. He repeatedly could not. That is not intended as a criticism of him but to re-enforce the difficulties he was encountering. He was unwell at the time and it is understandable in the circumstances. The result was that Mr Swann (and later Mr Gisbey) could not reasonably have been expected to link some of the evidence or assertions to what was being alleged.

162. Mr Swann's grievance outcome [801] dated 7 November stated the following actions were to be taken to address concerns raised:-
- 162.1. Ms Musson was to consider Mr Berns' reinstatement to his role.
 - 162.2. Ms Musson was very unusually, to consider if the Discipline procedures should be followed, where there had been a failure in standards. (That is unusual because as Mrs Berns will certainly know and Mr Berns may be aware due to the confidentiality of issues raised).
 - 162.3. Ms Musson consider the potential for some refresher training for colleagues around the departmental guidance covering management investigations, dips in performance and recording of conversations and meetings.
163. The rationale behind Mr Swann's decision was that there was evidence of poor performance but that the managers concerned had not addressed that in the right way. That an employee is performing poorly does not necessarily warrant a performance management process but, if it was sufficient to justify a move of role, as here, he found that DWP's procedures required some form of performance management process to have been put in train and it was not.
164. Much of what Mr Berns was seeking, Mr Swann upheld. We find Mr Swann was genuinely trying to his best to investigate reasonably but the difficulty as we say is by the time that his investigation had been concluded, Mr Berns had been off work for six months (since 11 May). Such delays have an effect on the way that past events are viewed but also an effect on the mental welfare of those involved.
165. That is re-inforced by what Mr Berns told us [SB/46]. At the time he went off ill, he referenced the way he had perceived events, thus *"During the course of this weekend, I could not escape the tirade of bullying and harassing behaviour that I had been subjected to from both Tina and Harry over the last few months, and all the negative feelings and emotions I had experienced as a result, alongside the complete depletion of my self-confidence, but also my trust and confidence in the Respondent."*
166. Mr Swann could have recommended Mr Berns be disciplined for covertly recording a meeting. He did not. Instead, he opted for words of advice (see his recommendation to Ms Musson at (94 and 162)). That is indicative of the way that he was trying to approach matters – that is, in a measured and fair way. It is very sad to see that because of what Mr Berns had been going through, that Mr Berns did not or could not see that this was what Mr Swann had done or was trying to do.
167. Mr Gisbey's role was to conduct a review. We find that is what he did. He conducted that in a genuine and reasonable way. By then, Mr Berns had sent a letter indicating what had been said to Mrs Chambers and Mr Harris. That related, as he accepted before us, to the contents of their evidence. He accepted that Mrs Chambers had become upset. He felt she became upset because she realised she had let him down. That may have been Mr Berns' perception. We find however that Mrs Chambers was upset due to the way Mr Berns challenged her when she too was trying to do her best in difficult

circumstances where she had been put in a position of potential conflict. She had raised that with Mr Swann, as had Mr Berns.

168. The reason they were both in that position we find fundamentally came down to one of the learning points that stands out in this case - a lack of oversight from the DWP managers. Mr Berns could have objected to Mrs Chambers line managing him. So could she. Both had raised it, Mr Berns via his union representative, and Mrs Chambers directly with Mr Swann. Mr Berns had raised the conflict with Mr Bell and similar matters before with the DWP.
169. There was a repeated theme here where individuals were instructed to undertake grievances or disciplinary investigations and decisions where they were not of the right grade or had conflicts. DWP has agreed that it will look at its procedures in that regard but also with regard to the support necessary to provide to staff in that situation.
170. That aside there were repeated reminders within the correspondence to Mr Berns about the need for confidentiality.
171. Mr Swann had been asked by Mr Berns to make the position clear in relation to speaking to Ms Chambers. By asking the question it was clear Mr Berns was aware there might be an issue. Mr Swann responded making the point that Mr Berns and Mrs Chambers could only speak about the generality. Mr Swann told us when we asked him directly about the issue that he was satisfied that both Mr Berns and Ms Chambers could deal with the situation adequately.
172. Despite those repeated reminders that issue arose. Mr Berns having volunteered it, Mr Gisbey indicated [967] his understanding was that that should not happen and he would raise this in his note to Ms Musson. Likewise, he concluded the actions taken during that period leading up to Mr Berns being moved fell short of the standards that were expected by the DWP when managing performance issues. Again, he stated he would raise that to Ms Musson.
173. We have set out above the way the issues were raised by Mr Berns changed and developed; we find that Mr Gisbey too was entitled to come to the views that he came to. He, like Mr Swann, met with Mr Berns and sought to identify what the issues were and what the focus of the issues were.
174. Following Mr Gisbey's outcome, his recommendation for the confidentiality breach to be investigated was passed to Miss Button although the email chain setting out how it was passed to her was not before us. She took HR advice [980].
175. In the interim Mr Berns met with Mrs Chambers on 17 February 2023. He accepted that he had not ruled out returning to work at that point.
176. Having taken HR advice Miss Button formed the view that Mr Berns volunteering what he had about his discussions with Ms Chambers and Mr Harris needed to be investigated. She had proper cause to do so. Her subsequent outcome aside, what he had volunteered as having occurred needed to be investigated.

177. Mr Berns received her invitation letter on 18 February 2023. He viewed the words used in the invitation letter by Ms Button as words of, or at least the threat of dismissal. That is not what was in that letter. Again, that is indicative of Mr Berns' mindset at the time. Contrary to the way he perceived it, the potential sanction was expressed by reference to *serious misconduct*. That sanction as we outline above did not include dismissal.
178. As a further example of his mindset Mr Berns viewed Mrs Chambers' remarks at interview as him being aggressive. That simply is not what she had said. What she had actually described [769] was that "... he was *emotional on Friday 6th May when he was shouting when ta[l]king to Tim and herself and removed the situation from the 'shop floor', he was emotional as he could not see the value of the ask and getting employers in. ...*" Again, those examples re-enforce how he was viewing matters at the time.
179. Given what Mr Berns accepted as how he viewed the meeting with Mrs Chambers on 17 February 2023, we find the receipt of Miss Button's letter on 18 February 2023 was the final straw or trigger for his resignation.
180. We have very considerable sympathy for Mr Berns. He has been through a lot and he gave over 30 years' service to the DWP before these events. The situation was not perfect, but these things rarely are. However, the legal formulation that we are required to apply is that an employer "*shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee*".
181. We found that in each of the instances that we have looked at DWP had reasonable and proper cause for its actions and viewed objectively in no sense was it acting in a way either calculated or likely to destroy or seriously damage the relationship of trust and confidence. For those reasons, Mr Berns' claim for constructive unfair dismissal must fail.
182. My colleagues expressly asked me to expand on the words of thanks I gave at the conclusion of submissions to both representatives. Firstly, to Mrs Berns. It was a very difficult few days for her. Whilst we note she was for the most part able to conduct matters in her role as an HR professional, she was understandably very worried about Mr Berns. We want to thank her for the way that she conducted this case and the support that she gave Mr Berns over the course of the tribunal hearing.
183. We also needed to express our gratitude to Mr Vines for the way that he conducted matters and the way he made this claim easier for Mr & Mrs Berns and the dignity and respect he showed to Mr Berns.
184. Finally, we wish to pass on to Mr & Mrs Berns all our very best wishes for the future.

signed electronically by me

Employment Judge Perry

Dated: 16 December 2024

APPENDIX – EXTRACT FROM THE LIST OF ISSUES

“1.2 Did the respondent do the following things:

1.3 From early 2022, subject the claimant (C) to a tirade of bullying, harassing, victimising and discriminatory behaviour (APOC para.12)? In particular:

1.3.1 APOC 28: From February 2022, respondent (R) blamed C for things outside his control (by Harry Bell (HB) and Tina Evans (TE)

1.3.2 APOC 15, 43: On 21st April 2022, R (HB) ignored C's Flexible working request;

1.3.3 APOC 31: From 16th March 2022, C was deliberately not provided with a promoted role (Temporary Employer Services Leader) by TE;

1.3.4 APOC 33: Before 31st May 22, TE and HB not supporting C, providing negative feedback, attempting to belittle C in front of colleagues in relation to the jobs fair;

1.3.5 APOC 34: On 21st April 2022, HB and TE singling out C for blame in relation to the lack of planned employer activity; and C's exclusion from a Team Away Day on 26th April 2022;

1.3.6 APOC 4: On 6th May 2022, R took steps to unilaterally change C's job role to Workcoach;

1.3.7 APOC 38: On 6th May 2022, in a phone call with TE, TE told C his role would be changing to "Workcoach" from 16th May 2022.

1.3.8 APOC 47: 11th May 2022, HB told the C that an OH referral would need to be made in relation to C's sickness absence;

1.3.9 APOC 53: from 11th May 2022, HB bombarding C with correspondence and threatening him with disciplinary action if C did not provide evidence to support his sickness absence;

1.3.10 APOC 42/ 61.(ii).(iii): C being continually requested to alter data that R was recording in respect of employer attendance at the office, so as to make the Stafford site appear as if it was managing better than it was;

1.3.11 APOC 4, 79: On 4th November 2022, Rachel Musson offered to re-instate C's Employer Advisor role;

1.3.12 APOC 95: from 7th November 2022, no support offered by R to C to re-integrate him into the workplace following the grievance, such as mediation.

1.3.13 Fail to address the Claimant's grievance? In particular:

1.3.14 APOC 56: From 11th June 2022 to 7th November 2022, R took an unreasonable and excessive amount of time to investigate C's grievance;

1.3.15 APOC 60: from 11th June 2022 to 7th November 2022, R unfairly and without proper cause limited C's Grievance to "allegations of bullying";

1.3.16 APOC 63: R conducted a flawed Grievance process, without proper investigations and with a failure to provide a balanced and genuine outcome;

1.3.17 APOC 64: inappropriate initial appointment of Elaine Dadley [sic.] as Investigation Manager;

1.3.18 APOC 66: a delay of 1 month for the new Investigation Manager to contact C;

1.3.19 APOC 68: inappropriate appointment of Lou Dawson to be Grievance decision maker, when she was employed at the same level as Corrine Dexter (Investigation Manager);

1.3.20 APOC 69: inappropriate appointment of Jasmine Trigg on 7th September 2022 as Decision Maker;

1.3.21 APOC 74: On 7th November 2022, Martin Swann (MS) (Decision Maker) dismissed C's evidence in relation to the allegations of bullying;

1.3.22 APOC 81: On 7th November 2022, the Grievance outcome by MS did not uphold C's allegations of bullying, harassment, and discriminatory treatment.

1.3.23 Fail to address the Claimant's grievance appeal? In particular:

1.3.24 APOC 85: inappropriate appointment of Brendon Downie as Grievance Appeal manager, without first obtaining C's agreement;

1.3.25 APOC 87: Paul Gisbey (PG) (Appeal manager) adopting a tick box approach to the appeal, rather than conduct a genuine investigation into C's concerns;

1.3.26 APOC 88-89: On 2nd February 2023, a lack of care by PG in investigating the grievance making the process entirely flawed and prejudicial towards C.

1.3.27 On 18th February 2023, R invited C to a disciplinary investigation meeting on 27th February 2023 concerning allegations that he had breached R's Standards of Behaviour by allegedly speaking to two witnesses about their statements during the grievance investigation. C asserts that R instigated a sham and concocted disciplinary process against C with the intention of removing him from his role under the false pretence of a fair reason. (see APOC 21, 96, 99).

1.4 If so, did any of these act/omissions, individually or cumulative, amount to a breach of the implied term of trust and confidence? The Tribunal will need to decide:

1.4.1 whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

1.4.2 whether it had reasonable and proper cause for doing so.

...”